

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GUARDANT HEALTH, INC.,
Plaintiff,

v.

NATERA, INC.,
Defendant.

Case No. [21-cv-04062-EMC](#)

**ORDER RE: OBJECTIONS TO “MUST
USE” EXHIBIT LIST**

Docket No. 732

The Court rules as follows re: the Parties “must use” exhibit list at Docket No. 732. “O” refers to overruled. “S” corresponds to sustained. “O” corresponds to overruled. “D” corresponds to deferred. “W” corresponds to waived.

The Court notes the following rulings do not absolve a party of laying the proper foundation and authentication necessary to introduce their respective exhibits.

Parties are referred to the Court’s *Motion in Limine* Order at Docket No. 509, and the Order on the Bellwether Exhibit List at Docket No. 611.

I. Guardant’s Certainly Will Use Exhibits and Natera’s Objections

Natera maintains the following specific objections to exhibits on Guardant’s “must use” list:

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
40	Natera corporate representative (Moshkevich)	Email re Signature Tissue Failure Rate Dashboard	R, 403, Dkt. 611 at 11 (Internal failure rate)	Relevant / not unduly prejudicial (falsity of failure rate claim); Court deferred ruling (Dkt. 611 at 11) until other evidence for context.	D [Part of Bellwether Order, need more context]
41	Natera corporate representative (Moshkevich)	Oncology Commercial Milestones	As to pp. 3-6 only: 105, R, 403, Dkt. 611 at 11 (failure rate)	Waiver; defendant includes this exhibit on its exhibit list. Relevant / not unduly prejudicial (falsity of failure rate claim); Court deferred ruling (Dkt. 611 at 11) until other evidence for context.	W [Court stated in Bellwether Order, Waiver if Opposing side includes exhibit]
51	Natera corporate representative (Moshkevich, Masukawa, Aleshin, Chapman, Sharma)	Email re Aarhaus FNs (Follow Up)	403, Dkt. 509 (MIL 3); (post Reinert internal discussion)	Relevant / not unduly prejudicial (Dkt. 509 at 15 allowing impeachment of Natera assertions) Also relevant to state of mind and commercial importance of performance metrics.	O [MIL states relevant for impeachment, state of mind]

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
87	Natera corporate witness (Aleshin)	ctDNA Sequencing Platform Evaluation - CRC Presurgery Plasma Samples Stage 1-IV	105, R, H, 403, Dkt. 509 (MIL 3), Dkt. 611 at 13 (not commercial assay)	Waiver; defendant includes this exhibit on its exhibit list. FRE 801(d)(2)(B); Relevant / not unduly prejudicial; Bakeoff ruled conditionally admissible (Dkt. 509 at 13 overruling 403 objection); (includes commercial assay BIP); Court deferred other determinations to trial.	W [Waiver for D's inclusion of exhibit]
90	Guardant corporate representative (McCoy, Talasaz)	Email re MolDx response to M. McCoy re Guardant Reveal Technical Assessment Submission	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	S; Not to be used for damages or delay, otherwise deferred pending showing of relevance
97	Natera corporate representative (Moshkevich, Masukawa)	Email re SOLAR Assistance	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	O; state of mind
112	Natera corporate representative (Masukawa)	Email re [INFORM] Dear Dr. Letter sent today (tumor-informed vs Tumor-naïve)	R, 403, Dkt, 326 at 25:17-26:4 (quantitation not alleged to be false/not relevant)	Relevant / not unduly prejudicial; concerns performance claims beyond quantitation	O

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
132	Natera or Guardant corporate representative	Joint Statement Regarding Plaintiff Guardant Health, Inc.'s Motion for Preliminary Injunction	Dkt. 509 (MIL 4), R, 403, BRPL	Waiver; defendant includes this exhibit on its exhibit list. Relevant as described in "Purpose of Exhibit" column (Evidence supporting Guardant's inability to undertake corrective advertising during pendency of lawsuit); Objections may be addressed by limiting instruction.	D (depends on whether Natera asserts failure to mitigate)
156	Natera corporate representative (Chapman, Aleshin, Moshkevich, Masukawa)	Email re: Draft bullet for MolDx - WIP	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	O; state of mind

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
194	Natera witness (Sharma, Moshkevich, Aleshin)	Email re Accepted: Aarhus CRC External Meeting (Attachment: Signatera pipeline updates; revised Signatera reports)	403, Dkt. 509 (MIL 3); (post Reinert internal discussion)	Relevant / not unduly prejudicial (Dkt. 509 at 15 allowing impeachment of Natera assertions) Also relevant to state of mind and commercial importance of performance metrics.	O; subject to MIL; relevant for impeachment, state of mind
196	Natera witness (Sharma, Moshkevich, Aleshin)	Email re Longitudinal Analysis inclusion criteria	403, Dkt. 509 (MIL 3); (post Reinert internal discussion)	Relevant / not unduly prejudicial (Dkt. 509 at 15 allowing impeachment of Natera assertions) Also relevant to state of mind and commercial importance of performance metrics.	O; subject to MIL; relevant for impeachment, state of mind
225	Natera corporate representative	Attachment to Ex. 1397 - Letter to Bien-Willner	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	O; state of mind
226	Natera corporate representative	Email re We have a meeting with MolDx tomorrow to discuss comparable/equivalent	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	O; state of mind
227	Natera corporate representative	Email re Medicare reveal plan	105 (not for damages or alleged delay)	Relevant for matters other than damages/delay.	O; relevant state of mind

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
245	Guardant corporate representative (Odegard)	Sample Failure Rate_2022-04-20	R, H, 403, Dkt. 611 at 11 (deferred) (GH internal failure rate)	Relevant / not unduly prejudicial (falsity of failure rate claim); Court deferred ruling (Dkt. 611 at 11) until other evidence for context.	D [MIL defers pending showing of relevance]
286	Chapman, Moshkevich, Aleshin, Masukawa	Emails re: Tumor-informed vs Tumor uninformed	A, FN, 403, 602, 611a, Dkt. 509 (MIL 4), M	Email Produced by Natera, Party Opponent Admission, FRE 702, FRE 703; relevant / not unduly prejudicial (scope of Natera false advertising).	O [Party admissions]
416	Hochster	Rutgers: Questions Regarding Conflict of Interest	H, R, 403	Business record; Relevant / not unduly prejudicial (relevant to credibility determination)	Moot, Hochster no longer witness

Exhibit No.	Sponsoring Witness	Description	Natera's Narrowed Objections	Guardant Response	Court's Outcome
423	Chapman	Natera Inc at Morgan Stanley 18th Annual Global Healthcare Conference (Virtual) - Final	Natera proposes both sides agree on admission of investor/earnings transcripts	Guardant agrees to withdraw its objections, with understanding that the version of the call transcripts used at trial must be complete transcripts of the entire call, and have no additional highlighting, notations, or opinions.	Moot, per Docket No. 732, page 3 Parties' agreement to Natera's proposal
595	Banks, McCoy, Odegaard, Price, Raymond, Rich, Eltoukhy, Talasaz	Genentech CRC Bake off Batch Summary	R, H, 403, Dkt. 509 (MIL 3), Dkt. 611 at 13 (not commercial assay)	Relevant / not unduly prejudicial; Bakeoff ruled conditionally admissible (Dkt. 509 at 13 overruling 403 objection); (includes commercial assay BIP); Court deferred other determinations to trial.	D

II. Natera's Certainly Will Use Exhibits and Guardant's Objections

Guardant maintains the following specific objections to exhibits on Natera's "must use" list:

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-0542	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Email from Whelchel Fwd:FW: "Guardant Reveal" Product Launch for Early Stage Colorectal Residual Disease Detection	R, H, FRE 602	Guardant's false/misleading statements to customers; authenticated during Guardant 30(b)(6) Deposition	O; If authenticated through 30(b)(6), document is admitted and need not be reauthenticated at trial. If authentication is disputed, Parties are to submit relevant excerpts.
TX-0544	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Draft of Core Reveal Sales Aid	R, FRE 602, FN	Draft Guardant advertisement ; goes to state of mind and knowledge of false/misleading statements.	O [Party admission]

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-0554	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Email from Farooqi re: NEW PRODUCT and Publication GuardantReveal	R, H, FRE 602	Guardant false/misleading statements to customers; authenticated during Guardant 30(b)(6) Deposition	O; If authenticated through 30(b)(6), document is admitted and need not be reauthenticated at trial. If authentication is disputed, Parties are to submit relevant excerpts.
TX-0569	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz	Email from Rich re: One more!	R, MIL	Cover email to TX 570.	O [party admission]
TX-0570	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz	Reinert Re Review PowerPoint Presentation (attachment to TX. 151)	R, MIL	Shows Guardant created a comparison chart between Reinert and Parikh demonstrating that the studies can be compared. Goes to state of mind, and lack of falsity of Natera's ads.	O

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-0585	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Presentation titled "Guardant Health New Product Introduction"	R, FRE 105, MIL	Shows Guardant compared data from Reinert to data from Parikh demonstrating that the studies can be compared. Goes to state of mind, and lack of falsity of Natera's ads.	O; state of mind
TX-0601	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Email from McCoy re: Baird Flash/NTRA/Sc hulte: Colorectal Cancer Test Gets Draft Local Coverage Decision	R, H, FN	Shows Guardant tried to manipulate the Parikh data to fast-follow Natera's local coverage decision. Also shows Guardant believed Signatera and Reveal data was comparable. Authenticated during Guardant 30(b)(6) deposition.	O; If authenticated through 30(b)(6), document is admitted and need not be reauthenticate d at trial. If authentication is disputed, Parties are to submit relevant excerpts.

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-0609	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker	Email from McCoy re: Guardant Reveal Technical Assessment Submission	R, MIL,	Technical assessment relevant to the performance of Reveal and Medicare coverage of same.	S; 403
TX-0621	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Metzker, Sood	Email from Banks re: Final MGH L1 MRD Manuscript For review	R, MIL	Manuscript regarding the Parikh study. Shows that Guardant suggested analyses, which is relevant to Guardant's manipulation of the Parikh study.	D; to be admissible must show related to prospective, blindness, or 1 year cutoff.]

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-0693	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Michael Metzker, Rebecca Betensky	Email from Saberi re: MGH	H, FRE 106	Shows Guardant flipped calls made in the Parikh study. Party admission.	D; same as above
TX-1000	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Nitin Sood	Email from Nitin Sood re LUNAR 1 ESMO	R, H	Shows Guardant did a comparative analysis between Signatera and Reveal. Party admission.	O, Party admission
TX-1002	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz, Nitin Sood	Email from Nitin Sood re LUNAR-1 MolDx Deck	R	Shows Guardant did a comparative analysis between Signatera and Reveal.	O, Party admission

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-1376	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz	Email from Leslie Bucheit re Reveal PEP deck with attachment FINAL Reveal P2P Education Deck Approved-OPT[3][99[- Read-Only.pptx	H, FRE 602, FRE 105	Guardant advertising and marketing statements.	O
TX-1444	Alexey Aleshin, Kevin Masukawa, Solomon Moshkevich, Steve Chapman, Rebecca Betensky, Howard Hochster, Susan McDonald, Michael Metzker, Jeffery Stec	Email from Alexey Aleshin re ctDNA LCD Finalized with attachments	R, FRE 403, FRCP 26	Relevant to Guardant's manipulation of the Parikh Study.	D; as above re permitted scope of challenge under ONY.
TX-1452	Kimberly Banks, Helmy Eltoukhy, Victoria Raymond, Thereasa Rich, Nitin Sood, Rebecca Betensky, Michael Metzker, Jeffery Stec	Email from Kimberly Banks re LUNAR 1 ESMO	R, MIL, FRCP 26	Shows Guardant did a comparative analysis between Signatera and Reveal, and shows lack of falsity of Natera's ads.	O

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-1517	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz	Dkt. 253-75 (Ex. ZZ to Natera's MSJ Opposition) ("Copy of flipped with TB YH.xlsx" produced at GHI00024905)	FRE 602, H	Evidence of flipped calls. Party admission. Authenticated in Guardant 30(b)(6) deposition.	O; If authenticated through 30(b)(6), document is admitted and need not be reauthenticated at trial. If authentication is disputed, Parties are to submit relevant excerpts.
TX-1786	Aparna Parikh	Clinical Cancer Research - Minimal Residual Disease using a Plasma-Only Circulating Tumor DNA Assay to Predict Recurrence of Metastatic Colorectal Cancer Following Curative Intent Treatment	R, FRE 403, NB, MIL, H, FRE 106, Sanctions Ruling Dkt. 719	Parikh publications regarding CRC.	S
TX-1799	Solomon Moshkevich, Steve Chapman	Email from Paul Billings re "Fwd: Natera : J.P. Morgan Healthcare Conference Takeaways"	H, FRE 602	State of mind. Authenticated through Natera's witnesses.	O

Exhibit No.	Sponsoring Witness	Description	Guardant's Narrowed Objections	Natera's Response	Court's Outcome
TX-1803	Kimberly Banks, Mark McCoy, Justin Odegaard, Kristin Price, Victoria Raymond, Thereasa Rich, Helmy Eltoukhy, AmirAli Talasaz	Native version of TX-1517 (produced at GHI00024905) (Ex. ZZ to Natera's MSJ Opposition) ("Copy of flipped with TB YH.xlsx") (native)	H, FRE 602	Evidence of flipped calls. Party admission.	D ; as noted above depends if within scope of permissible challenge under ONY

IT IS SO ORDERED.

Dated: November 4, 2024

EDWARD M. CHEN
United States District Judge